

Paper No. _____
Filed: October 7, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

IBG LLC; INTERACTIVE BROKERS LLC;
TRADESTATION GROUP, INC.; TRADESTATION SECURITIES, INC.;
TRADESTATION TECHNOLOGIES, INC.;
and IBFX, INC.

Petitioners

v.

TRADING TECHNOLOGIES INTERNATIONAL, INC.

Patent Owner

Case CBM2015-00182
U.S. Patent 6,772,132

PATENT OWNER'S OPPOSITION TO MOTION TO EXCLUDE

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I. Preliminary Statement

37 C.F.R. § 42 governs these proceedings, and it “shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding.” § 42.1(b). While Petitioners may prefer to focus on the “speedy” and “inexpensive” requirements, the “just” requirement cannot be ignored. In these proceedings, the “just” requirement mandates that the Board consider all of the evidence introduced by Patent Owner Trading Technologies International, Inc. (“TT”).

Much of TT’s evidence comes from the same district court litigation as Petitioners’ Exhibit 1019, the transcript of a 2005 deposition of Atshushi Kawashima on which Petitioners rely to allege the prior art status of TSE (Exhibit 1017). Petitioners provide no basis or justification for the Board to treat TT’s evidence from district court any differently from their own. Rather than simply “dump[ing]” its evidence into these proceedings, as alleged by Petitioners, TT took steps to ensure its evidence could come into the proceedings in a “just” way.

First, unlike Petitioners who ignored the Federal Rules of Evidence in introducing the 2005 Kawashima deposition transcript into these proceedings, TT sought to have certain Federal Rules of Evidence waived in the proceedings. Paper 38, Board’s Order at 2. Petitioners opposed this request despite the fact that it would have cured the hearsay problem associated with the 2005 Kawashima deposition transcript, and the Board denied the request. *See id.* at 2-3.

Second, TT sought additional discovery in the form of subpoenas to facilitate depositions that would reproduce here the evidence it (and Petitioners) already had from district court. *Id.* at 4. Petitioners again opposed, and the Board denied TT's request because it was "speculative." *Id.* at 5. Left with no other options, TT introduced its evidence from district court in the same way that Petitioners introduced their evidence from district court. There is no rule that prevented TT from doing so. Petitioners could have challenged TT's evidence by cross-examining its witnesses. They simply chose not to.

TT's evidence proves the validity of its patent. Petitioners cannot be allowed to bury their heads in the sand rather than face it. While the Board should consider all of TT's evidence directly, at a minimum, it was proper for TT's expert to rely on the evidence, so it must remain in the record. Ignoring the evidence would be unjust and would deprive TT of due process.

II. Standard

As the movant, Petitioners bear the burden of proving that the challenged exhibits are inadmissible. CBM2012-00002, Paper 66 at 59 (January 23, 2014); 37 C.F.R. § 42.20(c). Petitioners failed to meet their burden, and the Board disfavors excluding evidence as a matter of policy; "it is better to have a complete record of the evidence submitted by the parties than to exclude particular pieces." *Id.* at 60-61.

III. TT's Testimonial Evidence From District Court Is Admissible (Exhibits 2029, 2211, 2216, 2218–2222, 2223¹, 2224, 2225, 2227–2229, 2232, 2239, 2247, 2251, 2273–2276, 2286–2288, and 2292–2296).

Exhibits 2029, 2211, 2216, 2218–2222, 2223, 2224, 2225, 2227–2229, 2232, 2239, 2247, 2251, 2273–2276, 2286–2288, and 2292–2296 are declarations under penalty of perjury, transcripts of sworn deposition testimony, and transcripts of sworn trial testimony. All are from district court, many from the same litigation as the 2005 Kawashima deposition transcript, *TT v. eSpeed, Inc.*

A. Nothing justifies treating TT's testimonial evidence from district court differently from Petitioners' testimonial evidence from district court (i.e., the 2005 Kawashima deposition transcript).

Everyone's testimony from district court was under penalty of perjury, and all such testimony was subject to cross examination in these proceedings.

Regardless of whether such cross examination would be classified as routine discovery or additional discovery, the Board recognized that cross examination is

¹ Exhibit 2223 contains one document at pages 13-14 that is documentary, not testimonial, evidence from district court, so it is addressed in Section V of this paper. Petitioners objected to the *testimonial* evidence in Exhibits 2216, 2218, 2219, 2221, 2223, 2227, 2229, and 2239 as lacking authentication, but they have raised nothing that would call the authenticity of this testimony into question. The Exhibits themselves contain the declarants' declarations that their testimony was under penalty of perjury. Nothing more is required.

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